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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 10

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE,

Petitioner,

vs.

LIEUTENANT GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, ET AL.,

Respondents.

PETITION FOR A REHEARING.

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Of Counsel.

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PETITION FOR REHEARING.

The petitioner, William H. Giese, prays that this Court grant a rehearing of its order of October 15, 1951 (affirming the judgment of the Court of Appeals for the Seventh Circuit by an equally divided Court, and noting that "Mr. Justice Minton did not participate in the consideration or decision of this case") and, pursuant to Rule 33(1), briefly and distinctly states the following grounds therefor:

REASONS FOR GRANTING A REHEARING.

The Court of Appeals, very reluctantly (R. 56) deeming itself to be without power to pass upon the petitioner's basic contention that he was a *civilian, not* subject to trial by the military, *held* that an individual convicted by court-

martial *cannot* resort to habeas corpus *until* he has exhausted all administrative review procedures available to military personnel under the Articles of War, and therefore reversed the trial court's judgment (discharging the petitioner), with directions to remand the petitioner to the custody of the respondents, without prejudice to his making a new application after exhausting such remedies (R. 53-57). Such is the decision which this Court's order of October 15, 1951 allows to stand in this case.

As this Court recognized by granting certiorari (71 S. Ct. 613), the Court of Appeals' said decision not only conflicted in its ultimate result with the contrary decision of the Ninth Circuit in the *Drainer* case,[1] but decided an important question of Federal law which has never been, but should be, authoritatively settled by this Court because of the obvious impact of such a ruling not only upon some 7,500,000 honorably discharged army veterans of World War II (Respondents' Brief, p. 34) but upon some 150,000,000 *civilians* who, relying upon their constitutional guarantees of habeas corpus and grand juries except where they are in "the land or naval forces"[2] and upon a long line of judicial decisions unbroken until now,[3] have heretofore *assumed* that a *civilian*, wrongfully convicted by a court-martial having *no* jurisdiction over his *person*, was entitled to a determination of his *status* by a *civil* court

1. *Ex parte Drainer*, 65 F. Supp. 410, affirmed, *sub nom. Gould* v. *Drainer*, 158 F. 2d 981.

2. Art. I, §9, U. S. Constitution; Vth Amendment thereto.

3. *Wise* v. *Withers*, 3 Cranch 329, 2 L. Ed. 457 (1805); *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650 (1830); *United States ex rel. Sanantonio* v. *Warden*, 265 F. 787 (1919); *United States ex rel. Viscardi* v. *MacDonald*, 265 F. 695 (1920); *Ex parte Wilson*, 33 F. 2d 214 (1929); *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (1929); *Billings* v. *Truesdell*, 321 U. S. 542 (1944); *Ex parte Drainer*, 65 F. Supp. 410, affirmed, *sub nom. Gould* v. *Drainer*, 158 F. 2d 981 (1947); *United States ex rel. Hirshberg* v. *Cook*, 336 U. S. 210 (1949).

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and, if successful, to his immediate discharge from military custody, *without* waiting months or perhaps years for the completion of the devious administrative review procedures established by the Articles of War, which apply only to military personnel.

As pointed out in our petition, briefs and oral argument, neither *Gusik* v. *Schilder*, 340 U. S. 128, nor *Whelchel* v. *McDonald*, 340 U. S. 122, both decided during the October 1950 term, passed on this vital issue because *neither* of said cases involved a soldier who had received an honorable *discharge* and *both* were admittedly still on active duty at the time of their trial and conviction by court-martial.

Thus the present affirmance by an equally divided Court leaves the state of the law on this highly important question of Federal law still in a state of uncertainty and flux and might well, in a subsequent case, result in a contrary decision on the same issue (see, *e. g.*, *Hurst* v. *Moore-McCormack Line*, 328 U. S. 707, overruled in substance in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783).

We fully appreciate, as is well stated in Stern and Gressman's recent (1950) Supreme Court Practice, at page 327, that:

> "* * * when the equal division has resulted from a failure of a member of the Court to participate for *personal* reasons, and the petition for rehearing *will not result in his participation*, the mere fact of the equal division will not cause the petition to be granted (*e. g.*, *Stemmer* v. *New York*, 336 U. S. 963, 337 U. S. 921), although it may be granted for other reasons (*Marzani* v. *United States*, 335 U. S. 895, 336 U. S. 910, 922, * * *)." (Emphasis ours and footnotes transposed into text.)

and, were this a case where the ninth Justice (Mr. Justice Minton), needed to break the tie, would be unavailable for

a long period of time or where, for *personal* reasons (such as his having participated in the decision of the court below or his having been Attorney or Solicitor General at the time of such decision), he deemed himself *disqualified* from participating in the consideration or decision of the case, this petition for a rehearing would not have been filed; but such is *not* the situation in the case at bar.

On the *contrary*, so far as we are advised, Mr. Justice Minton is in *no* way *disqualified* from participating in the consideration or decision of this case (he was a Justice of this Court long before the Court of Appeals' decision on October 5, 1950), and he was, as this Court knows, unable to participate here only because of an injury which, while it temporarily incapacitated him, is apparently not of such a permanent character as to prevent his participating in a reargument or new decision in the relatively near future.

Under such circumstances we submit that it would be highly appropriate, and certainly not without sound precedent[4], for this Court to grant a rehearing in this case in order to afford Mr. Justice Minton an opportunity to participate in the consideration and decision of this case in order to break the tie.

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4. In Stern and Gressman's said Supreme Court Practice, at page 327, it is said:

> "Despite the above limitations, rehearings are normally granted when the prior decision was by an equally divided Court, and a new Justice is available to break the tie. *E.g. Gray* v. *Powell*, 312 U. S. 666, 313 U. S. 596, 314 U. S. 402; *Halliburton Co.* v. *Walker*, 326 U. S. 696, 327 U. S. 812, 329 U. S. 1."

In *People of the State of Illinois ex rel. Gordon* v. *Campbell*, 327 U. S. 819, this Court, after hearing full oral argument and deciding without dissent a companion case (*People of the State of Illinois ex rel. Gordon* v. *United States*, 328 U. S. 8) on its merits, *deferred* its decision pending Mr. Justice Jackson's return from the Nuremberg trials, "restored" the case to the docket for the next year and assigned it "for reargument before a full bench."

CONCLUSION.

For the reasons above set forth and those set forth in our petition for certiorari, briefs and oral argument, the petitioner prays that a rehearing be granted and that, upon such rehearing, the judgment of the Court of Appeals for the Seventh Circuit be reversed in its entirety or be reversed and remanded with appropriate directions.

Respectfully submitted,

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ABNER F. BOND,
ROBERT E. CLEVELAND,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify, under Rule 33, that the above and foregoing petition is presented in good faith and not for delay.

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Attorney for Petitioner.